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# Where There Are Good Arms, There Must Be Good Laws: An Empirical Assessment of Customary International Law regarding Preemptive Force

Ryan Schildkraut

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# Where There Are Good Arms, There Must Be Good Laws<sup>1</sup>: An Empirical Assessment of Customary International Law Regarding Preemptive Force

Ryan Schildkraut\*

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1. NICCOLÒ MACHIAVELLI, *THE PRINCE* 48 (Harvey C. Mansfield, Jr. trans., Univ. Chi. Press 1985) (1513) ("The principal foundations that all states have, new ones as well as old or mixed, are good laws and good arms. And because there cannot be good laws where there are not good arms, and where there are good arms there must be good laws . . .").

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## INTRODUCTION

If a growing number of legal scholars are correct in arguing that the prohibition of preemptive self-defense set forth in Article 51 of the U.N. Charter is no longer reasonable, is there some other set of rules that govern the ability of states to engage in preemptive force? Quantitative data suggests that states implicitly have agreed to be bound by a different set of rules, apart from Article 51, and condone some amount of preemptive force in the interstate system. This means that a new norm of customary law has emerged that supersedes the statutory obligations set forth in the Charter.

This Note is divided into five main parts. Part I summarizes approaches to international law, distinguishing statutory law from customary law. Part II describes international customary and statutory law of preemptive force by summarizing the theoretical justifications for preemptive force, the prohibition of preemptive force by Article 51 of the U.N. Charter, and the various scholarly arguments critiquing the application of Article 51 (statutory law) to real behavior of states (customary law). This Note does not weigh the merits of these legal theories. Instead, Part II situates this Note in the vast scholarly literature on Article 51, noting that this literature, although critical of Article 51, does not set out to measure whether there exists a new customary law of preemptive force that supersedes the U.N. Charter.

Part III looks to quantitative data to analyze state behavior regarding preemptive force since the adoption of the U.N. Charter. Part III introduces sources of empirical data, discusses methodological issues, and explains and justifies the assumption that the data can be parsed to isolate instances of preemptive force. Part IV reports initial findings of this project that confirm

the argument that states do not follow Article 51's statutory prohibition on preemptive force. The data also shows remarkable patterns of consistency over time regarding interstate use of preemptive force. This Note posits that these empirical trends provide strong evidence of a new norm of customary law that governs state behavior independent of Article 51. In other words, it is a new form of customary law, and not statutory law, that controls state behavior regarding preemptive force. Finally, Part V summarizes the findings of the quantitative research, proposes questions for future research, and offers a cautionary note on the implications of these findings in a world increasingly troubled by terrorists, rogue states, and WMD.

## I. APPROACHES TO INTERNATIONAL LAW

The difficulty in interpreting international law stems from the condition of international anarchy.<sup>2</sup> Within nations, both laws and law enforcement exist; between nations laws exist but law enforcement does not.<sup>3</sup> Within a country, the presence of law enforcement means that most people act (custom) in accordance with the written law (statute).<sup>4</sup> Between nations, custom often diverges from statute.<sup>5</sup> As custom is a crucial reference point for the formulation and interpretation of law, the capriciousness of custom under anarchy hinders the formulation and interpretation of international law.<sup>6</sup> The resulting uncertainty produces wide-open debates about international law.<sup>7</sup>

### A. CUSTOMARY LAW

Most scholars consider customary law to be at the core of international law.<sup>8</sup> Customary international law is formally

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2. See, e.g., JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 30 (2001); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

3. See MEARSHEIMER, *supra* note 2, at 30.

4. See J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 459-65 (2000) (explaining the concept of customary law and the authority problem).

5. See Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 701 (2005).

6. See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law* 66 U. CHI. L. REV. 1113, 1114 (1999).

7. *Id.*

8. See, e.g., *id.* at 1113; Kelly, *supra* note 4, at 451.

defined as a "general and consistent practice of states followed by them from a sense of legal obligation."<sup>9</sup> Thus, there are two elements to this definition: (1) the general and consistent practice of states; and (2) the sense of legal obligation, or *opinio juris*.<sup>10</sup>

By definition, customary law can be a better reflection of actual behavior than statutory law.<sup>11</sup>

For example, if the speed limit on a road is fifty-five miles per hour [statutory law], but it is widely accepted that one may travel at sixty miles per hour without repercussions [customary law—consistent behavior and sense of legal obligation], then the speed limit has established a new normative standard (fifty-five plus five) that individuals accept as appropriate for judging deviant behavior.<sup>12</sup>

There is an extensive body of literature concerning why nations comply with customary international law, what it means to comply with customary international law, and how customary international law changes over time.<sup>13</sup> Despite the scholarly attention given to this topic, there is no "common understanding of how customary international legal norms are formed, nor agreement on" their content.<sup>14</sup> Thucydides, an ancient Greek historian and the author of the History of the Peloponnesian War, came close to identifying the origins of custom as a source of law: The strong do what they want, and then it becomes law.<sup>15</sup> Modern theorists argue that international norms influence the behavior of states because weak states are easily influenced by the behavior of strong states.<sup>16</sup> There is a substantial body of empirical evidence

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9. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987). Similarly, Article 38 of the Statute of the International Court of Justice (ICJ) defines custom as "evidence of a general practice accepted as law." Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>. Legal scholar Anthony D'Amato asserts that the importance of custom "is rooted in the desire of the international community for order and security—aims which are indistinguishable from the meaning of 'law.'" ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 270 (1971).

10. Goldsmith & Posner, *supra* note 6, at 1116.

11. See Kelly, *supra* note 4, at 453, 458.

12. See Murphy, *supra* note 5, at 724.

13. See Goldsmith & Posner, *supra* note 6, at 1114 n.2.

14. See Kelly, *supra* note 4, at 450.

15. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 394 (R. Crowley trans., 1920).

16. See David Sloss, *Do International Norms Influence State Behavior?*, 38 GEO. WASH. INT'L L. REV. 159, 163 (2006) (reviewing JACK L. GOLDSMITH & ERIC A.

supporting this position.<sup>17</sup>

Customary rules develop in a decentralized manner over time based on social interaction, not because they are imposed by a central authority.<sup>18</sup> Historically, the time period required before state behavior hardened into customary law has been lengthy, often over many decades.<sup>19</sup> Recently, others have argued that custom is a dynamic process that can change rapidly or even instantly.<sup>20</sup>

There is also much scholarly debate concerning what constitutes evidence of custom.<sup>21</sup> There is wide disagreement over whether the substance of customary law is best determined by normative or positivist techniques.<sup>22</sup> Scholars like Goldsmith and Posner note that customary law can be examined empirically.<sup>23</sup> Nevertheless, courts and scholars increasingly tend to ignore empirical evidence of state practice and instead base their arguments on theory.<sup>24</sup> Those who favor an empirical approach to determining customary international law find the normative approach to be premature.<sup>25</sup> They argue that most customary international 'norms' asserted in the scholarly literature are declared without evidence of general and

POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)).

17. See Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1762–80 (2003) (summarizing empirical evidence that states exhibit a variety of institutional and organizational similarities resulting from global forces that induce states to imitate other states). *But see* GOLDSMITH & POSNER, *supra* note 16 (arguing that international norms do not influence state behavior because each state acts in its own self-interest).

18. See Kelly, *supra* note 4, at 464.

19. Katherine N. Guernsey, Comment, *The North Continental Shelf Cases*, 27 OHIO N.U. L. REV. 141, 143 (2000).

20. See, e.g., Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 513 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983); Benjamin Langille, Note, *It's "Instant Custom": How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT'L & COMP. L. REV. 145 (2003).

21. See Kelly, *supra* note 4, at 455. See generally EUROPEAN UNIVERSITY INSTITUTE, SERIES A, *CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING* (Antonio Cassese & Joseph H. H. Weiler eds., 1988) (discussing how change in international law affect what qualifies as evidence of custom).

22. See Kelly, *supra* note 4, at 458 (discussing the debate between normativists and positivists).

23. See Goldsmith & Posner, *supra* note 6, at 1121.

24. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 839–40 (1997) (citing examples).

25. See Kelly, *supra* note 4, at 458.

consistent state practice.<sup>26</sup> They argue that non-empirical customs have no authority from the international community; therefore, application of them as international law is inappropriate.<sup>27</sup> Instead, they advise scholars to look to positive acts of states to provide the evidence of the underlying norm.<sup>28</sup> For these commentators, repetitive practice is the only material evidence of a customary law.<sup>29</sup>

## B. STATUTORY LAW

The statutory approach to international law is based on treaties that are written and signed by the nations involved.<sup>30</sup> The involvement of the signatories should serve to facilitate interpretation of the law and help ensure compliance.<sup>31</sup> However, the lack of international law enforcement means that the cost of breaking international law is often very low.<sup>32</sup> This invites nations to interpret and follow the law expediently rather than correctly.<sup>33</sup> Nonetheless, the tangible and consensual nature of statutory law makes it the most concrete point of departure for analysis of international law.<sup>34</sup>

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26. See *id.* at 453.

27. See *id.* at 456.

28. See *id.* at 458.

29. Cf. *id.* at 461 (discussing the opposing normativist contention that customary law "is not mere practice or habitual behavior, rather it is a normative order consisting of rights and duties abstracted from practice").

30. See Goldsmith & Posner, *supra* note 6, at 1170-72.

31. See *id.*

32. See, e.g., Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 515 n.35 (2004) (discussing the major costs a nation considers when contemplating violating an international agreement).

33. See ROBERT J. BECK, ANTHONY CLARK AREND, & ROBERT D. VANDER LUGT, *INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 305 (noting that state compliance with international law is unpredictable when international rules conflict with specific policy goals).

34. The traditional starting point for sources of international law is Article 38 of the Statute of the International Court of Justice (which is itself a form of statutory law). *Id.* at 296. Article 38 lists, in the following order, the sources of international law: statutory law, customary law, general principles of law, judicial decisions, and other academic sources. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060.

Summary of Approaches to International Law		
Paradigm:	Statutory	Customary
Laws & actions based on:	International treaties and agreements	Practice and precedent
Binds:	Signatories	All nations
Advantages:	Reflects consent of nations; Prohibits cross-border violence; Permits self-defense	Laws/standards have best fit to international behavior; Is not empty rhetoric
Disadvantages:	Often does not reflect practice of nations; Low cost to break law	Standards are vague and often contradictory; Interpretation is difficult
Respects:	Treaties	Practice
Neglects:	Practice	Ideals
Application to preemptive force:	U.N. Charter arts. 2(4) and 51	Concepts of imminence, necessity, and proportionality

## II. THE INTERNATIONAL LAW OF PREEMPTIVE FORCE

### A. CUSTOMARY LAW PRIOR TO THE U.N. CHARTER: THE CAROLINE STANDARD

For centuries, the international system has recognized that states have an inherent right to defend themselves from aggression.<sup>35</sup> The first formal declaration of self-defense can be traced to the now infamous *Caroline* case.<sup>36</sup> During a 19th century uprising against British rule in Canada, some of the anti-British rebels operated from American soil in New York, just across the Canadian border.<sup>37</sup> Britain asked the U.S. to prevent the rebels from using New York as a sanctuary and base of operations, but the U.S. took no action.<sup>38</sup> In retaliation,

35. See Murphy, *supra* note 5, at 701.

36. Details of the *Caroline* case are recounted in R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82-92 (1938).

37. *Id.* at 82-83.

38. *Id.* at 83.



British forces staged a small raid over the Canadian border and into New York.<sup>39</sup> The British seized the *Caroline*, a vessel used by the rebels to navigate from New York into Canada, set it ablaze and dumped the ship over Niagara Falls.<sup>40</sup> The U.S. claimed the British had violated their territorial sovereignty.<sup>41</sup> Britain responded by asserting self-defense.<sup>42</sup> Daniel Webster, the U.S. Secretary of State, explained that the burden was on the British to demonstrate a "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation" and that acts were not "unreasonable or excessive"; only then would Britain's actions be deemed legitimate.<sup>43</sup> Webster's definition of self-defense, which focused on imminence, necessity, and proportionality, has become the universally accepted standard for lawful self-defense.<sup>44</sup>

## B. STATUTORY LAW: THE U.N. CHARTER

In 1945, world leaders gathered in San Francisco to draft the U.N. Charter as a means to enforce a lasting peace following World War II.<sup>45</sup> Under Article 2(4) of the Charter, the authors categorically proscribed "the threat or use of force against the territorial integrity or political independence of any state."<sup>46</sup> Although broadly drafted, Article 2(4) prohibits only three specific applications of force in international relations:

- the threat or use of force to the territorial integrity of states;
- the threat or use of force contrary to the political independence of states; and

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39. *Id.* at 83–84.

40. *Id.* at 84.

41. *Id.* at 85–86.

42. *Id.* at 85–87.

43. Letter from Daniel Webster, Secretary of State of the United States, to Henry S. Fox, Esq., Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty (Apr. 24, 1841), reprinted in 29 BRIT. & FOREIGN ST. PAPERS 1129, 1137–38 (1857). For a discussion of the *Caroline* case, see Thomas Graham, Jr., *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHI. J. INT'L L. 1, 6–8 (2003).

44. For example, the Nuremberg Tribunal, see International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), reprinted in 41 AM. J. INT'L L. 172, 205 (1947), and the ICJ, see *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 94 ¶ 176 (June 27), have given the definition positive treatment.

45. See History of the United Nations, ¶¶ 4, 6, <http://www.un.org/aboutun/unhistory>.

46. U.N. Charter art. 2(4), para. 4.

- the threat or use of force “in any manner inconsistent with the Purposes of the United Nations,”<sup>47</sup> i.e., the “maint[enance of] international peace and security.”<sup>48</sup>

Article 51, however, recognizes the “inherent right” of a state subjected to aggression to engage in self-defense:

Nothing in the present Charter shall impair the *inherent right* of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>49</sup>

Reading Article 2(4) in conjunction with Article 51 yields the conclusion that states may only use force as an act of self-defense.<sup>50</sup> Article 51 is not an affirmative grant of self-defense, however. Rather, it is a statement of situations in which the “inherent right” is not precluded by the Charter. Even those situations are limited by time, or “until the Security Council has taken measures necessary to maintain international peace and security.”<sup>51</sup>

#### C. COMPETING STATUTORY INTERPRETATIONS OF THE U.N. CHARTER

Since the adoption of the U.N. Charter in 1945, international lawyers have articulated very different views regarding the legality of preemptive force. In his recent article, “The Doctrine of Preemptive Self-Defense,” Professor Sean D. Murphy summarizes and condenses these arguments into four main schools of thought: “the strict constructionist school, the imminent threat school, the qualitative threat school, and the

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47. *Id.*

48. U.N. Charter art. 1, para. 1.

49. U.N. Charter art. 51 (emphasis added).

50. See William C. Bradford, “*The Duty to Defend Them*”: A Natural Law Justification for the Bush Doctrine of Preventive War, 79 NOTRE DAME L. REV. 1365, 1377 (2004); Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT’L L. 513, 521–22 (2003).

51. Thomas K. Plofchan, Jr., *Article 51: Limits of Self-Defense?*, 13 MICH. J. INT’L L. 336, 339–40 (1992) (quoting U.N. Charter art. 51).

'charter is dead' school."<sup>52</sup> Murphy distinguishes the schools by the relative importance each places on two main considerations: the ordinary meaning of the U.N. Charter and the importance of state behavior since 1945.<sup>53</sup> The ordinary meaning of the U.N. Charter is important as a matter of statutory law.<sup>54</sup> Post-1945 state practice is relevant for the purposes of: (1) interpreting the meaning of the Charter, because the parties' conduct demonstrates the parties' interpretation of the meaning; and (2) establishing a new norm of customary law that might supersede the Charter.<sup>55</sup>

### 1. *The Strict Constructionist School*

Strict constructionists rely heavily on the ordinary meaning of the statutory language of the Charter.<sup>56</sup> They read Article 2(4) broadly to prohibit the use of force by one state against another.<sup>57</sup> For strict constructionists, there are only two exceptions to the prohibition on force: (1) Security Council authorization,<sup>58</sup> and (2) self-defense pursuant to Article 51.<sup>59</sup>

When analyzing an act of self-defense under Article 51, strict constructionists tend to focus on the phrase "if an armed attack occurs."<sup>60</sup> To strict constructionists, preemptive force is always illegal because, by definition, an "armed attack" has not

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52. Murphy, *supra* note 5, at 703.

53. *See id.* at 706–19.

54. *See id.* at 721.

55. *See id.* at 720.

56. *See id.* at 706–11 (characterizing the Strict Constructionist school).

57. *Id.* at 706–07.

58. *See generally* ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 133–49 (2004) (discussing power of Security Council under Chapter VII and "the threshold that triggers Chapter VII action"); U.N. Charter, art. 39–51, (setting forth U.N. procedures for handling threats to peace, breaches of peace, and acts of aggression, including Security Council authorization of use of force against states that aggressively threaten peace).

59. *See* U.N. Charter, *supra* note 46, at art. 51.

60. *See, e.g.,* HANS Kelsen, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS

FUNDAMENTAL PROBLEMS 797–98 (1951) (arguing that Article 51's allowance of use of force in self-defense applies only when nation faces actual armed attack and, therefore, no "imminent" threat of attack can justify armed aggression under Article 51); 2 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 156 (H. Lauterpacht ed., Longmans, Green & Co. 7th ed. 1952) (noting that U.N. Charter "confines the right of armed self-defence [sic] to the case of an armed attack as distinguished from anticipated attack or from various forms of unfriendly conduct falling short of armed attack").

yet occurred.<sup>61</sup> The plain language of Article 51 clearly dictates that a state must wait until “an armed attack occurs” before it lawfully can resort to self-defense as a justification for using force that would otherwise be banned by Article 2(4).<sup>62</sup> For strict constructionists, the plain meaning of “armed attack” seems to characterize overt military action, such as armies crossing borders, air forces dropping bombs, or navies firing missiles.<sup>63</sup> If the requirement of an “armed attack” were loosened, they argue, it would be impossible to determine whether states were invoking Article 51 out of a legitimate need for self-defense, or if they were concealing their own aggressive intentions under the encompassing veil of Article 51.<sup>64</sup> Strict constructionists contend that a more liberal reading of Article 51 would create a gaping loophole in the Charter’s prohibition on force as a means for resolving disputes between nations.<sup>65</sup>

Strict constructionists further argue that a narrow reading of Article 51 is confirmed by the legislative history.<sup>66</sup> The Charter drafters considered imposing limits on self-defense, such as requiring it to be “imminent,” “necessary,” or “reasonable.”<sup>67</sup> They ultimately decided to draw a bright line at any “armed attack,” because it could be objectively determined and would eliminate uncertainty.<sup>68</sup> Many commentators point out that this bright-line rule prohibiting any “armed attack” was realistic because the drafters assumed that a powerful Security Council would respond to all threats and make anticipatory self-

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61. See 2 OPPENHEIM, *supra* note 60.

62. See U.N. Charter, *supra* note 46, at art. 51. The U.N. General Assembly has confirmed that the required level of aggression for a state legally use self-defense under Article 51 is an armed attack. See DEFINITION OF AGGRESSION, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31 (1974), <http://www.un.org/documents/ga/res/29/ares29.htm>.

63. Anthony Clark Arend, *International Law and Rogue States: The Failure of the Charter Framework*, 36 NEW ENG. L. REV. 735, 739 (2002).

64. See Bradford, *supra* note 50, at 1387–1440.

65. See John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 730–31 (2004) (characterizing the restrictivist “doctrinal” position of other scholars).

66. See, e.g., OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 112–13 (1991) (discussing interpretations of Article 2(4) and noting that its words may qualify as an all-inclusive prohibition against force but that the extent of this prohibition is not clear from textual analysis alone); see also Timothy Kearly, *Regulation of Preventative and Preemptive Force in the United Nations Charter: A Search for Original Intent*, 3 WYO. L. REV. 663 (2003) (discussing a thorough account of Charter drafting process).

67. See generally Kearly, *supra* note 66, at 726–27.

68. See generally *id.*

defense a thing of the past.<sup>69</sup>

In fact, it was the U.S. that insisted on inserting the "if an armed attack occurs" phrase.<sup>70</sup> Green Hackworth, the State Department's legal advisor, was worried that this language "greatly qualified the right of self-defense," but Deputy U.S. Negotiator Harold Stassen assured him that the language of Article 51 was "intentional and sound."<sup>71</sup> Stassen stated: "We did not want exercised the right of self-defense before an armed attack had occurred."<sup>72</sup> When another member of the U.S. delegation, Mr. Gates, "posed a question as to our freedom under this provision in case a fleet had started from abroad against an American republic, but had not yet attacked," Stassen replied that "we could not under this provision attack the fleet but we could send a fleet of our own and be ready in case an attack came."<sup>73</sup> Strict constructionists maintain that the internal debate shows Article 51 to mean exactly what it says: that states may resort to self-defense only if an "armed attack" has occurred and only until the Security Council takes appropriate action.<sup>74</sup> They further argue that the drafters of Article 51 deliberately intended to close the door on the use of preemptive force when they included the "armed attack" standard.<sup>75</sup>

Of the four schools, strict constructionists have placed the least value on state behavior since 1945. They find evidence of state practice too sparse and unconvincing to establish a reinterpretation of Article 51.<sup>76</sup>

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69. This was further coupled with the requirement that states seek Security Council approval before they use defensive force. *Id.*

70. See Thomas M. Frank, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL'Y 51, 58 (2001).

71. *Minutes of the Forty-Eighth Meeting (Executive Session), of the United States Delegation, Held at San Francisco, Sunday, May 20, 1945, 12 Noon, in 1 FOREIGN REL. OF THE U.S. 1945 at 813, 818 (1967).*

72. *Id.*

73. *Minutes of the Thirty-Eighth Meeting of the United States Delegation, Held at San Francisco, Monday, May 14, 1945, 9:05 a.m., in 1 FOREIGN REL. OF THE U.S. 1945 at 707, 709 (1967).*

74. See, e.g., YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 167 (Cambridge Univ. Press 3d ed. 2001).

75. The legislative history also reveals that the framers intended that the right of self-defense, when invoked under Article 51, should exist at all times unless the Security Council was to specifically forbid its exercise. See Plofchan, *supra* note 51, at 347-50.

76. See Murphy, *supra* note 5, at 722.

## 2. *The Imminent Threat School*

The imminent threat school also focuses on the ordinary meaning of statutory language.<sup>77</sup> However, whereas strict constructionists focus on the “armed attack” phrase, the imminent threat school emphasizes the language “nothing shall impair the inherent right.”<sup>78</sup> For these scholars, Article 51 clearly protects the “inherent right” of self-defense that stems from the *Caroline* standard.<sup>79</sup> Customary law prior to 1945 allowed a state to defend itself against an imminent attack.<sup>80</sup> The imminent threat school argues that the plain language of the U.N. Charter clearly protects this right.<sup>81</sup>

The imminent threat school also reads the “armed attack” language to include an imminent attack.<sup>82</sup> They argue that strict constructionists’ restrictive reading of Article 51’s “armed attack” requirement necessarily limits states’ “inherent right” to self-defense under customary international law.<sup>83</sup> The imminent threat school believes that a restrictive reading of Article 51 is nonsensical.<sup>84</sup> They argue that Article 51 clearly states that nothing “shall impair” the inherent right of states to engage in self-defense, but then places two significant constraints on the so-called “inherent” right that is supposedly unimpaired.<sup>85</sup> First, Article 51 dictates that states may not exercise their “inherent” right to self-defense until an “armed attack occurs.”<sup>86</sup> Second, Article 51 only allows states to

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77. *See id.* at 712.

78. *See id.*

79. *See, e.g.,* D.W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 187 (1958) (stating reference to “inherent right” in Article 51 indicates “an existing right, independent of the Charter and not the subject of an express grant”).

80. *See supra* notes 36–44 and accompanying text.

81. *See, e.g.,* BOWETT, *supra* note 79, at 188–89 (arguing that Article 51 definitely allows right to self-defense and that this right has always been presumed to be anticipatory).

82. *See* Murphy, *supra* note 5, at 712 (explaining how the imminent threat school reads the phrase “if an armed attack occurs”).

83. *Id.* at 739.

84. *See* Yoo, *supra* note 65, at 775 (“If a state instead were obligated to wait until a threat was temporally imminent, it could miss a limited window of opportunity to prevent the attack and to avoid harm to civilians.”).

85. *See* Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 553–54 (2002) (“[T]he right to self-defense, supposedly protected from impairment by the Charter, is permitted under the actual text of Article 51 to be impaired to the extent the Security Council chooses to impair it (but the right of course remains inherent).”).

86. *See id.* at 553–54.

exercise their "inherent" right to self-defense "until" the Security Council takes action.<sup>87</sup> Because it would be absurd for the Charter text to say that it does not impair the "inherent right," but then impair it twice, the imminent threat school concludes that the original meaning of the Charter must embrace *Caroline's* imminency standard.<sup>88</sup>

Post-1945 state practice is important to the imminent threat school because it demonstrates that states accept the use of preemptive force when an attack is imminent and unavoidable.<sup>89</sup> They believe the evidence proves that states continue to abide by the traditional *Caroline* standard.<sup>90</sup>

### 3. The Qualitative Threat School

The qualitative threat school emphasizes dramatic changes in the international landscape since 1945, particularly due to WMD, rogue states, and terrorists.<sup>91</sup> For these scholars, adhering either to a hyper-technical reading of Article 51 or the *Caroline* imminence standard is a recipe for disaster in the modern world.<sup>92</sup> From a practical perspective, they argue that it would be absurd to require a state to "take the first hit" when it could effectively defend itself by acting preemptively.<sup>93</sup>

These scholars believe that international law should consider more than just temporal factors.<sup>94</sup> Rather, they believe

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87. U.N. Charter, art. 51.

88. See, e.g., Derek W. Bowett, *The Interrelation of Theories of Intervention and Self-Defense*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 38, 38–40 (John Norton Moore ed., 1974) (arguing that Article 51 was intended to preserve the "traditional right" of self-defense, which included the right to take action against a threat before actual armed attack occurred). As further evidence, the imminent threat school cites the French translation of U.N. Charter, which is equally as authoritative as the English version. The French translations preserves the right to self-defense "dans un cas où un Membre des Nations Unies est l'objet d'une agression armée" ("in a situation where a Member of the United Nations is the object of an armed attack"), which is a less restrictive formulation. See J.L. BRIERLY, *THE LAW OF NATIONS* 419 (H. Waldock ed., 6th ed. 1963) (1928) (analyzing other interpretations of French text and finding room for uncertainty in interpretation).

89. See Murphy, *supra* note 5, at 722–23.

90. See *supra* note 87 and accompanying text.

91. See Murphy, *supra* note 5, at 715.

92. See *id.*

93. Claude Humphrey & Meredith Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 451, 498 (1952) ("[I]t would be a travesty of the purposes of the Charter to compel a defending State to allow its assailant to deliver the first, and perhaps fatal blow.").

94. See, e.g., John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 572–74 (2003) (examining the *Caroline* test in light of WMD and finding that

preemptive force is legally justified when it is necessary and proportional.<sup>95</sup> The test of necessity is met when there are no peaceful means available to redress the grievance and the use of force is a last resort.<sup>96</sup> Proportionality requires that actions taken in self-defense are proportional in scale and effect to the original aggression.<sup>97</sup>

Recent state behavior is especially important for the qualitative threat school because it shows that modern policymakers consider qualitative factors in addition to imminence.<sup>98</sup> As examples of situations where preemptive force would have been prohibited by strict constructionist and imminent threat scholars, the qualitative threat school cites the U.S. quarantine of Cuba, the U.S. invasion of Panama in 1989, and the U.S. attacks against Libya in 1986, Iraq in 1993, and Sudan and Afghanistan in 1998. In 2003, the U.S. justified waging war on Saddam Hussein's Iraqi regime as a legal act of preemptive force.<sup>99</sup> In his address to the nation on March 17, 2003, President Bush rested his justification of intervention in Iraq, not on the imminency of the threat, but largely on the ground that "[i]n 1 year, or 5 years, the power of Iraq to inflict harm on all free nations would be multiplied many times over," and that failure to "meet the threat now, where it arises, before it can appear suddenly in our skies and in our cities" would be an act of "national suicide."<sup>100</sup> In a more recent example, Israel

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current test has become significantly more nuanced than Webster's *Caroline* definition). See generally Mark L. Rockefeller, *The "Imminent Threat" Requirement for the Use of Preemptive Military Force: Is It Time For a Non-Temporal Standard?*, 33 DENV. J. INT'L L. & POL'Y 131 (2004).

95. See, e.g., *id.*; Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT'L L. 209, 219–20 (2003).

96. See Schmitt, *supra* note 50, at 530.

97. See *id.* at 531.

98. See Murphy, *supra* note 5, at 723.

99. In his speech before the U.N. in September 2002, President Bush characterized the possible use of force against Iraq as necessary to eliminate a dangerous threat to international peace and security. George W. Bush, U.S. Pres., President's Address to the United Nations General Assembly, 38 WKLY COMP. PRES. DOC. 1529 (Sept. 12, 2002) ("We cannot stand by and do nothing while dangers gather."), available at: <http://whitehouse.gov/news/releases/2002/09/20020912-1.html>.

In another example (though prior to the U.N. Charter), the Nazis justified the initial World War II attacks on the Soviet Union, Norway, and Denmark as self-defense, fearing that Germany herself would be attacked first if she did not resort to force. Michael J. Glennon, *Preempting Terrorism: The case for anticipatory self-defense*, WKLY. STANDARD, Jan. 28, 2002, at 24.

100. George W. Bush, U.S. Pres., President's Address to the Nation on Iraq, 39 WKLY COMP. PRES. DOC. 338, 340 (Mar. 17, 2003). In fact, the Bush administration's



claimed it was acting preemptively when it bombed southern Lebanon in an attempt to wipe out the military capabilities of Hezbollah, an alleged terrorist group stationed in Lebanon. Many commentators<sup>101</sup> and political leaders, including U.N. Secretary-General Kofi Annan,<sup>102</sup> argued that Israel had a legal right to self-defense.

#### 4. *The "Charter Is Dead" School*

Members of the "charter is dead" school, also known as legal realists, believe that Article 51 is no longer regarded as obligatory by states and, as such, is no longer binding law.<sup>103</sup> In evaluating whether a rule rises to the level of an international law, legal realists ask two questions: (1) whether the rule is authoritative,<sup>104</sup> and (2) whether it controls the behavior of states.<sup>105</sup> They find that Article 51 fails on both counts. First, they argue, Article 51 is not authoritative because states have consistently claimed the right to use force in circumstances that fall outside any reasonable interpretation of Article 51.<sup>106</sup>

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National Security Strategy argues that "international law recognize[s] that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack." WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), available at: <http://www.whitehouse.gov/nsc/nss.pdf>. This is by no means a revolutionary view in American foreign policy. Decades ago, Secretary of State Frank Kellogg—negotiator of the Kellogg-Briand pact which outlawed war—noted that the right of self-defense "is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether the circumstances require recourse to war in self-defense." Frank B. Kellogg, U.S. Sec'y of State, Address of the Honorable Frank B. Kellogg (Apr.28, 1928), in 22 Proc Am Socy Intl L 141, 143.

101. See, e.g., Richard Holbrooke, *The Guns of August*, WASH. POST, Aug. 10, 2006, at A23 ("Under the universally accepted doctrine of self-defense, which is embodied in Article 51 of the U.N. Charter, there is no question that Israel has a legitimate right to take action against a group that has sworn to destroy it and had hidden some 13,000 missiles in southern Lebanonn.").

102. Kofi Annan, U.N. Sec'y Gen., Secretary-General's briefing to the Security Council on the situation in the Middle East (July 20, 2006), available at <http://www.un.org/apps/sg/sgstats.asp?nid=2142>.

103. See Michael J. Glennon, *How War Left The Law Behind*, N.Y. TIMES, Nov. 21, 2002, at A37; Glennon, *supra* note 85, at 539–40.

104. State practice matures into customary law if the states engaging in the practice believe that it is legally obligatory. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986). See generally MARK WIESBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II* (1997).

105. See Glennon, *supra* note 99.

106. See Arend, *supra* note 63, at 752.

Second, Article 51 does not control state behavior because states have used it hundreds of times in ways that violate the plain language and intent of the rule.<sup>107</sup> Legal realists conclude that behavior that would otherwise be illegal under Article 51 is not really unlawful because states do it all the time.<sup>108</sup> If states truly wanted to enforce Article 51, realists contend that they would have made the cost of violation greater than the perceived benefits.<sup>109</sup>

The "charter is dead" school maintains that Article 51 has no bearing on state decision-making.<sup>110</sup> In the real world, they argue, rules will not work if they do not "reflect the underlying geopolitical realities" of how states operate.<sup>111</sup> They believe that international law regarding preemptive force exists in two separate universes: *de jure* (a set of illusory rules in world of forms that does not exist) and *de facto* (the rules that actually guide state behavior in the international system).<sup>112</sup> Excessive violation of a rule of international law, whether statutory or customary, causes the rule to be supplanted either by another rule or no rule at all.<sup>113</sup> At the end of the day, states will continue to set rules (or no rules) for themselves pertaining to or proscribing the legality of preemptive force, not because of Article 51, but because their survival is at stake.<sup>114</sup> For realists,

107. *Id.*

108. See, e.g., Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 940 (2005) ("When deviant behavior reaches the point that the first violation has been emulated by a sufficient number of states, the conduct in question ceases to be a violation."); Glennon, *supra* note 85, at 549 ("Article 51 is grounded upon premises that neither accurately describe nor realistically prescribe state behavior."); Yoo, *supra* note 65, at 739, 745–50; W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 280 (1985) (suggesting that states have ignored the Charter provisions governing the use of force, and modified the role of the Security Council, by practice).

109. See, e.g., Glennon, *supra* note 85, at 549.

110. It is important to note that legal realists believe Article 51 is not relevant to decision-making as a matter of law. That is, a policy maker does not worry about the fact that his decision to use force is legally prohibited by Article 51. As Professor Yoo remarks, however, Article 51 might be relevant in terms of reputational damage which decreases a state's ability to enter international agreements, limits its credibility in negotiating with other nations, and signals overall untrustworthiness. See Yoo, *supra* note 65, at 796.

111. See Glennon, *supra* note 85, at 557.

112. *Id.* at 540. The point of legal realism is to say what the law is, not what it should be. *Id.* at 557.

113. See Glennon, *supra* note 108, at 940.

114. See ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM* 56–58 (1993) (stating that states "are simply not committed enough to the principle of collective security to be

there is no point in splitting legal hairs about how to read the plain language of Article 51 because it is completely devoid of any legally significant normative value.<sup>115</sup>

Legal realists note that the statutory law created by the Charter failed because the drafters of the Charter designed their system to prevent the last war, not the next.<sup>116</sup> They argue that Article 51 failed because it was based on two wrong assumptions: that the Security Council would make fast and objective decisions when collective action was necessary, and that states would give the Security Council the authority to police their affairs.<sup>117</sup>

For members of the "charter is dead" school, post-1945 practice of states can only yield the conclusion that states do not adhere to the Charter in any legally meaningful way. Legal realists contend that hard evidence demonstrates that any reading of Article 51 has proven impracticable in the real world.<sup>118</sup> Since the adoption of the U.N. Charter in 1945, there have been over 1,500 occurrences of aggression in the interstate system.<sup>119</sup> In every one of these conflicts, legal realists argue that at least one of the belligerents necessarily violated the U.N. Charter, and many of them did so under the guise of Article 51

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willing to use force in circumstances that seem to have little direct relevance to their own national security goals"); William C. Bradford, *In the Minds of Men: A Theory of Compliance with the Laws of War*, 36 ARIZ. ST. L. J. 1243, 1246 (2004) (arguing that although international law does not per se dictate state behavior, states are prone to accept those legal obligations that do not significantly impose real constraints).

115. See Glennon, *supra* note 85, at 557 ("There is no point in trying to devise a legal-sounding formula for an exception if no agreement exists on the scope of the concept of 'aggression' that lies at the heart of the general rule.").

116. See Yoo, *supra* note 65, at 736.

117. See Franck, *supra* note 70, at 51-52.

118. Officially, the International Court of Justice maintains that force is only lawful if it is used in conformity with the Charter. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), 1996 I.C.J. 225, ¶ 47 (July 8, 1996). However, the court seemed to extend the armed attack threshold in *Nicaragua*, *supra* note 44. In that case, the U.S. alleged that Nicaragua was providing various forms of support to the FMLN, a rebel group in El Salvador. *Id.* at ¶ 146. The court did not find any evidence of assistance from the Nicaraguan government to the FMLN, *id.* at ¶ 153, but it did comment that evidence of aid to the rebels would constitute an armed attack. *Id.* at ¶ 156. This was the first time the court implicitly acknowledged that "indirect aggression" could rise to the level of an armed attack.

119. This figure is based on data from the Militarized Interstate Disputes ("MID") database, discussed *infra* notes 133-139 and accompanying text. MID coding rules are described in Charles S. Gochman & Zeev Maoz, *Militarized Interstate Disputes, 1816-1976: Procedures, Patterns, and Insights*, 28 J. CONFLICT RESOLUTION 585 (1984). The MID definition of "hostility" is analogous to the U.N.'s definition of "aggression." *Id.* at 587.

protection.<sup>120</sup>

#### D. IMPORTANCE OF STATE BEHAVIOR DURING THE U.N. ERA

As discussed in the section above, each of the four schools appears interested, to some degree, in state behavior since the adoption of the U.N. Charter in 1945.<sup>121</sup> Professor Murphy argues that if the four schools were presented with a comprehensive empirical analysis of state behavior, they might find it easier to interpret the meaning of the Charter or, alternatively, to determine whether a new norm of customary law<sup>122</sup> has emerged that supersedes the obligations set forth in the Charter:

[I]nternational lawyers rarely explain their view as to the circumstances that merit using state practice to establish an evolution in the state of the law and too often provide only a cursory analysis of such practice to see if those circumstances are met. Unfortunately, in reading the literature one cannot help but feel that international lawyers are often coming to this issue with firm predispositions as to whether [preemptive force] should or should not be legal and then molding their interpretation of state practice to fit their predispositions.<sup>123</sup>

Professor Murphy maintains that a thorough understanding of post-1945 state behavior would “allow international lawyers to move away from a binary discussion of whether preemptive self-defense is lawful or unlawful, to one that explores the subtleties and nuances of how states react to varying levels of such force being used in different kind of factual scenarios.”<sup>124</sup> By analyzing the empirical trends that underlie customary law, scholars and policymakers would be better equipped to create meaningful statutory law.<sup>125</sup>

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120. See Glennon, *supra* note 85.

121. See *supra* notes 52–120 and accompanying text.

122. For example, Arend and Beck contend that a new legal regime, known as the “post-Charter self-help” paradigm has replaced Article 51 as the fundamental rule governing the use of preemptive force. See AREND & BECK, *supra* note 33, at 178–79.

123. See Murphy, *supra* note 5, at 720.

124. *Id.*

125. See generally Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005) (arguing that the only way to craft effective international law is through an integrated approach that utilizes empirical evidence).

### III. USING DATA TO DETERMINE THE CUSTOMARY LAW OF PREEMPTIVE FORCE

As discussed previously, customary law is best understood by looking at empirical data of state behavior, yet the academic legal community has largely neglected this type of analysis.<sup>126</sup> Conversely, quantitative analysis is a growing trend in the scholarly political science literature concerning interstate use of force, causes of war, and reliability of alliances.<sup>127</sup> Clearly, quantitative datasets have helped to provide a foundation that has allowed the scientific study of war to make significant progress in recent years.<sup>128</sup> Nevertheless, the study of international law remains theory-rich and data-poor, and, as a result, much of statutory international law is based on legal theory rather than on arguments constructed from hard evidence.<sup>129</sup> International lawyers (whether government

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126. See Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 MICH. L. REV. 2075, 2085 (1993) (arguing that empirical research "remains to this day the most neglected and ridiculously undervalued as well as the most potentially fruitful branch of legal studies"). Rare examples of legal research in this area that utilize quantitative data include Mariano-Florentino Cuéllar, *Reflections on Sovereignty and Collective Security*, 40 STAN J. INT'L L. 211 (2004), William C. Bradford, *International Legal Regimes and the Incidence of Interstate War in the Twentieth Century: A Cursory Quantitative Assessment of the Associative Relationship*, 16 AM. U. INT'L L. REV. 647 (2001), and Lori Fisler Damrosch, *Use of Force and Constitutionalism*, 36 COLUM. J. TRANSNAT'L L. 449 (1997).

127. Beginning the early 1960's, researchers nationwide have empirically analyzed similar issues as part of the Correlates of War project. The initial scope of the project was to cause data on the causes and consequences of war. Since then, a multitude of datasets have been born covering a wide variety of phenomena in international relations. There now exist data on alliances, material capabilities, diplomatic recognition, international organizations and their memberships, inter- and intra-state conflict, regime types, changes of government, cultural composition of states, and several forms of political rebellion. See, e.g., <http://correlatesofwar.org/>.

128. For example, see Geller and Singer's review of the findings of 500+ large-N analyses on the causes of war. DANIEL S. GELLER & J. DAVID SINGER, *NATIONS AT WAR: A SCIENTIFIC STUDY OF INTERNATIONAL CONFLICT* (1998).

129. See Gordon, *supra* note 126, at 2100 (observing that "doctrine is still the staple commodity, even in the reviews edited at fancy schools that go in for the fancy new stuff."); Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 329 (1989) ("[T]wo forms of legal writing—doctrinal and theoretical—account for almost the entire corpus of legal scholarship. Only a tiny fraction is devoted to the gathering of *new* facts about how law actually operates and affects us.") (emphasis in original); see also Bradford, *supra* note 114, at 1247–48 (noting that the study of international law is "undernourished with insights from other disciplines," and that the few studies that do use quantitative data are "insufficiently rigorous and too underspecified" to offer any valuable insights).

attorneys, other practitioners, or academics) might benefit from employing the empirical methods of political scientists who have studied international relations for some time.<sup>130</sup> So submitted Louis Henkin in his class study, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY*:

[T]he student of law and the student of politics . . . purport to be looking at the same world from the vantage point of important disciplines. It seems unfortunate, indeed destructive, that they should not, at the least, hear each other.<sup>131</sup>

This Note seeks to bridge the divide between scholars of international law and international relations and foster interdisciplinary dialogue between the two concerning the use of preemptive force.

Quantitative data provides a powerful tool for answering the question posed by this note: whether any new set of rules, beyond Article 51, govern the international relations among states concerning the use of preemptive force. If critics of Article 51 are correct that the statutory law is inapplicable to modern world affairs because it does not accurately represent the way states operate, then quantitative data has substantial

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130. International law, at a fundamental level, is part of international relations. The line between international law and international relations is difficult to draw in an international system with no executive branch, no police, no prisons, no standing army, no real legislature, and no real authoritative system of international adjudication. See John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139, 139–40 (1996) (stating that there is no good reason for the fields of international law and international relations to exist in “serene isolation” from one another). As Slaughter Burley states,

If social science has any validity at all, the postulates developed by political scientists concerning patterns and regularities in state behavior must afford a foundation and framework for legal efforts to regulate that behavior. For instance, if it could be reliably shown that a great-power condominium was the best guarantee of international peace, then international law and organization should accommodate and support an arrangement that confers special privileges on a group of great powers. On the other hand, if the prospects for peace hang on some other set of state characteristics, then international security organizations and norms designed to regulate the use of force should be reshaped accordingly. From the political science side, if law—whether international, transnational or purely domestic—does push the behavior of states toward outcomes other than those predicted by power and the pursuit of national interest, then political scientists must revise their models to take account of legal variables.

Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 205–06 (1993).

131. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 6 (1968).

value to the extent that it explains state practice or customary law.

#### A. THE MILITARIZED INTERSTATE DISPUTES DATABASE

The primary dataset used by scholars to study international use of force is the Militarized Interstate Disputes (MID) database.<sup>132</sup> MID records disputes between states that become militarized. In each case recorded, there is a threat, display, or use of military force by one state directed towards the government, official representatives, official forces, property, or territory of another state.<sup>133</sup> Militarized interstate disputes exist because two or more states disagree about how to peacefully resolve one or more issues.<sup>134</sup> The dataset covers the years from 1815 to 2001 and contains information on over 2,300 disputes.

Militarized incidents vary significantly in magnitude, reflecting differences between each type of action. MID creates four categories to capture these disputes. *Threats* are "verbal indications of hostile intent."<sup>135</sup> *Displays* of force involve military demonstrations but no combat interactions.<sup>136</sup> *Uses* of military force represent sub-war military operation, such as blockades, clashes, seizures, raids, and occupation of territory.<sup>137</sup> When militarized interstate disputes evolve or escalate to the point where military combat is sufficiently sustained that it will result in a minimum of 1,000 total battle deaths, they become interstate *wars*.<sup>138</sup> All four categories of force measured by MID are prohibited under Article 2(4) of the U.N. Charter unless they are allowed under Article 51 as acts of self-defense.<sup>139</sup>

The categorization of each dispute represents the highest action taken by the initiator in the entire course of the dispute, not necessarily its first, or only, action. Many disputes that are coded as uses of force began as threats or displays of force. This

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132. The MID dataset is available for online download. Militarized Interstate Disputes (v.3.02), available at <http://www.correlatesofwar.org/COW2%20Data/MIDs/MID302.html>.

133. Daniel M. Jones, Stuart A. Bremer, & J. David Singer, *Militarized Interstate Disputes, 1816-1992: Rationale, Coding Rules, and Empirical Patterns*, 15 CONFLICT MGMT. & PEACE SCI. 163, 168 (1996).

134. *Id.*

135. *Id.* at 170.

136. *Id.*

137. *Id.* at 171.

138. *Id.*

139. See U.N. Charter, *supra* note 46, at arts. 2(4) and 51.

provides a good indication of dispute escalation. A hostility level that only rises to the level of a threat or display of force implies that the combatants were able to resolve the dispute without inflicting actual military force. When the hostility level reaches a use of force, there is evidence that the combatants could not (or did not try to) resolve the conflict without resorting to arms.

## B. MEASURING PREEMPTIVE INITIATION – DEFINITIONS AND KEY ASSUMPTIONS

For purposes of this Note, self-defense is categorized as either legal or illegal under the U.N. Charter. Generally, a state is prohibited from threatening, displaying, or using force under Article 2(4), unless it has suffered the requisite “armed attack” necessary to legally justify its actions under Article 51.<sup>140</sup> Therefore, a state that resorts to force because it has been attacked engages in legal self-defense, per the terms of the U.N. Charter. On the other hand, a state that has not suffered an “armed attack,” but nevertheless believes that such an attack is imminent, will also claim that Article 51 justifies its “defensive” actions. This type of anticipatory self-defense is not allowed under the plain language of Article 51 and, therefore, is technically illegal.<sup>141</sup> Anticipatory self-defense is the same thing as preemptive force.<sup>142</sup> To avoid confusion, this Note will only use the term “preemptive force.”

MID variables provide the framework to isolate cases of preemptive force. This project does not recode any aspect of the database. For each conflict, MID identifies the dispute originator<sup>143</sup> and the revisionist. The originator is “the state that takes the first militarized action.”<sup>144</sup> The revisionist is “the

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140. *Id.*

141. *Id.*

142. “Preemptive force” is used to refer to the use of armed coercion by a state to prevent another state from pursuing a particular course of action that is not yet directly threatening, but which, if permitted to continue, could result at some future point in an act of armed coercion against the first state. See Sean D. Murphy, *Brave New World: The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 704 (2005). Such preemptive force is, of course, “anticipatory” and might even be called “preventive,” but for purposes of this Note, such terminology is not used to describe this form of self-defense.

143. The MID initiator is determined by looking at two separate variables: side A and originator. Side A represents all states on the attacking side of the dispute, including those states that joined after the first attack. Originator refers to all states involved in day one of the conflict and excludes all joiners. Therefore, the Side A originator is the attacking originator.

144. Jones, Bremer, & Singer, *supra* note 133, at 178.



state or states that sought to overturn the status quo ante."<sup>145</sup>

For purposes of analysis, the revisionist is the true instigator of the dispute. The originator only represents the state that took the first militarized action (threat, display, use, or war). Revisionist is a better indicator of the true aggressor because it indicates the state that actively pursues altering the status quo and/or heightens tensions between the sides. For example, MID codes Poland as the originator of World War II because it fired the first shot against Nazi Germany, the revisionist. Clearly, history shows that Germany was the true aggressor in the conflict.

Combining originator and revisionist coding for each dispute produces three key assumptions critical to an analysis of the post-1945 U.N. era. First, a state that is both an originator and a revisionist sought to change the status quo by actively resorting to offensive military force. In general, these "aggressive initiators" facially violated Article 2(4)'s prohibition on offensive military force. Second, a state that is an originator but not a revisionist did not actively seek to change the status quo, but resorted to preemptive military force to prevent the revisionist from achieving its aggressive goals. Although the actions of these "preemptive initiators" also violated Article 2(4), these states seemingly would have claimed justification for their actions under a pragmatic reading of Article 51.<sup>146</sup> Third, when no state involved on either side of the conflict is a revisionist, the state that first employs force is also a "preemptive initiator." If neither side intended to heighten hostilities, the state that took the first action presumably misperceived the intentions of the other side. Because both sides truly wanted peace, there would be no other good reason for the initiator to have used force unless it mistakenly believed that its adversary was aggressive. In taking action to preempt a threat that did not exist, this initiator would nonetheless claim that it acted preemptively to defuse a threat that seemed very real at the time.

To summarize, an aggressive initiator attacks a non-

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145. *Id.*

146. Nations do not regularly explain the legal basis of their actions, nor is it clear how to determine the legal reasoning, if any, that a state engages in before commencing a particular course of action. See Kelly, *supra* note 4, at 470. Even the I.C.J., in most cases, does not investigate the attitude of a state on the legal character of its actions. See Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 537 (1993).

threatening state in an attempt to alter the status quo. On the other hand, a preemptive initiator believes that another state is poised to employ force against it, so it chooses to take preemptive action to preserve its first strike advantage. Preemptive initiators do not want to resort to force, but feel compelled to do so out of self-defense, despite the fact that the plain language of the U.N. Charter prohibits their actions.

#### IV. INITIAL FINDINGS

As discussed in Part I, critics of Article 51 conclude that it is inapplicable in the real world as a matter of statutory law. Taking their views as true, the question remains whether state behavior is governed by customary law that supersedes the U.N. Charter. For there to be customary law, there must be evidence of custom. Part II discussed how MID data is valuable for determining custom, or consistent patterns of state behavior. If states implicitly have agreed to a new set of rules concerning preemptive force, then MID data will show consistency in state behavior. On the other hand, empirical results that are random or inconsistent would suggest that state behavior is not guided by customary international law. The findings described in detail below show that state behavior is remarkably consistent and that customary law seems to govern state behavior.

##### A. USE OF FORCE IN THE U.N. ERA

From 1945 to 2001, there were 1,537 militarized interstate disputes in the interstate system and an overwhelming majority included the use of force by initiators. Of these, 61 were threats of force, 418 were displays of force, 1,029 were uses of force, and 29 were full-fledged wars. The dispute's classification represents the *highest* action taken by the initiator. For example, a state that threatens force, displays force, and then uses force is coded under the *use* of force category.<sup>147</sup>

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147. When two states both share responsibility for a dispute escalating to a use of force, it is often difficult to identify the originator and revisionist. The classification frequently rests in the eye of the beholder. What is intended as a preventive, defensive action by one side may appear to be an offensive maneuver to the other side. For example, state A builds a border wall to prevent state B from ever attacking. State B thinks that state A built the wall so that its soldiers can mount themselves at the top and fire down on state B. As a result, state B builds its own wall, higher than state A's wall. This now confirms state A's (mis)perception that state B is truly aggressive. It is not obviously clear how MID would code this

**Table 1 - Type of force employed by states since 1945**

	Threat	Display	Use	War	Total
n	61	418	1029	29	1537
%	4.0%	27.2%	66.9%	1.9%	

A simple schoolyard analogy helps to clarify the point here. Imagine that Biff, the school bully, intends to beat up George, a feeble student, during recess to get his lunch money. Although Biff has made no direct threat, George believes, for a variety of reasons, that Biff will pummel him if George does not hand over his lunch money. When class is released for recess, George immediately runs to the baseball diamond to fetch a baseball bat. He sneaks up behind Biff, clutching the bat in his hands, poised to take a swing. When Biff turns around, George tells him: "Try to take my lunch money and I'll whack you over the head with this bat."<sup>148</sup> How will Biff react? Biff might acquiesce and assure George that he will not steal his money, thus averting a major playground fight. George's hostility level would be recorded as a *display*. In some circumstances, however, Biff might issue a counter-threat, display his own means of force (pull out a knife from his pocket), or use force himself (kick George in the shin). If Biff chooses one of these options and George retaliates by using the bat, George's hostility level would be classified as a *use* of force. There would be no record of George's initial threat of force.

Overall, the data indicate that most conflicts escalate into uses of force. It is uncommon for a state merely to threaten or display force and not use it. This implies that states do not tend to make hollow threats. Despite the efforts of the U.N. Charter to proscribe the use of force, states have remained relatively trigger-happy when it comes to resolving disputes.

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scenario. At some point, the creators of MID were forced to make a judgment call as to which state wanted to change the status quo and which was the originator of the dispute. The coding at the outset of the dispute is critical to how the event is understood down the line. For example, a revisionist target that uses force as self-defense to a preemptive initiator's threat or display of force does not become an initiator for being the first state to actually resort to arms. This is because the target was an aggressor before the initiator threatened or displayed force.

148. George might also whack Biff over the head without first issuing a verbal warning. Such a "surprise attack" would immediately rise to the level of a *use* of force.

## B. FREQUENCY OF PREEMPTIVE INITIATION

Preemptive initiators started 29.5% of disputes occurring since 1945. In other words, nearly one-third of all conflicts were initiated by non-aggressive states that would not have resorted to force *but for* the aggressive behavior of an adversary. It is safe to assume that these states seemingly claimed legal justification for their actions under Article 51.<sup>149</sup> However, because they resorted to self-defense before suffering the requisite “armed attack,” they acted in direct violation of the plain language and original intent of Article 51.<sup>150</sup>

## C. ESCALATION IN CONFLICTS STARTED BY PREEMPTIVE INITIATORS

Compared to aggressive initiators, preemptive initiators were more inclined to threaten or display force rather than actually use it. Of all instances of preemptive initiation, 41.8% did not rise to the level of a use of force, compared to only 26.7% for aggressive initiation. This data indicates that in a majority of cases, a threat or display of force is enough to defuse the aggressive intentions of a bully state. This result makes sense because a preemptive initiator will cease its own aggressive behavior once the bully target (the true aggressor) stops its antagonism. Escalation is more prevalent when the initiator is aggressive. It is critical to recognize that although disputes started by preemptive initiators are less likely to escalate compared to disputes started by aggressive initiators, those started by preemptive initiators still escalate more often than not.

Parsing the data by category of initiator for each type of force allows for comparison of the propensity of preemptive and

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149. This assumption does not posit that *all* “preemptive initiators,” as defined *supra*, acted preemptively. It would be a tremendously difficult task to review each historical record and determine whether the initiator truly acted preemptively. The benefit of MID data is that it allows researchers to measure overall trends. Exceptions may exist to the general assumption, but, on the whole, the data is reliable and captures patterns in state behavior as accurately as possible. Similarly, this assumption does not posit that *all* “preemptive initiators” justified their actions as self-defense. While it is true that many “preemptive initiators” made no attempt to legally justify their actions, it is likely that if the international community forced them to justify their actions, they would have cited self-defense under Article 51.

150. “Aggressive initiators,” on the other hand, started 70.5% of disputes. In these situations, one state resorted to force against an unthreatening target. Because Article 2(4) prohibits all resorts to force, nearly three out of four disputes involved a clear violation of Article 2(4).

aggressive initiators to engage in each type of force. The data in Table 3 shows when the dispute involves a display of force, but no escalation to actual military combat, a preemptive initiator was the instigator 42.6% of the time. When a dispute escalates to a use of force, a preemptive initiator was the instigator in 25.2%, or about one of every four occurrences.

**Table 2 - Category of initiator by type of force**

Initiator type	Threat	Display	Use	War
<i>Aggressive</i>	4.5%	22.2%	71.1%	2.2%
<i>Preemptive</i>	2.6%	39.2%	57.0%	1.1%

**Table 3 - Percentage type of force by initiator type**

Initiator type	Threat	Display	Use	War
<i>Aggressive</i>	80.3%	57.4%	74.8%	82.8%
<i>Preemptive</i>	19.7%	42.6%	25.2%	17.2%

The findings in Tables 2 and 3 suggest that disputes started by aggressive initiators are more dangerous and deadly than those started by preemptive initiators. In cases of preemptive initiation, the data cannot predict how the dispute would have played out had the true aggressor attacked before it was preempted, but figures on the other instances of aggressive initiation provide a solid guide. Assuming that preemptively initiated disputes would have followed the general historical pattern of aggressively initiated disputes if the aggressor had attacked first, then preemptive action worked as an effective deterrent<sup>151</sup> to prevent many disputes from escalating.

There are significant consequences for international law if states believe that preemptive force is an effective deterrent. At a basic level, states will not abide by a statutory law, like Article 51, that prohibits all preemptive force.<sup>152</sup> The data presented thus far confirms what critics have been preaching for years: preemptive force is vital to state survival and cannot be completely proscribed.

This is not to say, however, that there are no limits on

151. For a conceptual summary of the international relations theory of deterrence, see Alexander L. George & Richard Smoke, *Deterrence and Foreign Policy*, 41 WORLD POL. 170 (1989).

152. See, e.g., Schmitt, *supra* note 50, at 543.

states' abilities to take preemptive action. While empirical findings confirm that Article 51 is not authoritative on state action, they do not necessarily imply the conclusion that no law governs state behavior. If one accepts the premise of the arguments offered by many scholars, the question then becomes whether any other set of rules, apart from Article 51, governs state behavior. Either states exist in a system of pure anarchy, where no norms guide behavior, or there is customary law that limits preemptive force.

Trends in state behavior can be measured by looking at changes over time. Instead of merely asking how many disputes started by preemptive initiators have escalated to the level of a use of force since 1945, legal scholars should be more concerned with how these levels have changed over time. If hostility levels increasingly rise to uses of force, then conflicts are more likely to have escalated. Deterrence would be less and less effective and security spirals would be prevalent. Conversely, a decreasing rate in the use of force implies that deterrence is becoming increasingly effective.

#### D. RATES OF PREEMPTIVE INITIATION OVER TIME

If customary law, in lieu of Article 51, governs the behavior of states engaging in preemptive force, state behavior must be regular and consistent. Fluctuating rates of preemptive force over time would suggest that states do not condone a certain amount of preemptive force as custom. When preemptive force reaches an unacceptable level, states will no longer be able to tolerate it and will impose harsh punishments on preemptive initiators to deter future acts of preemptive force. On the other hand, evidence showing that initiators use preemptive force at a constant rate over time suggests that states permit that amount of preemptive initiation as a matter of custom.<sup>153</sup>

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153. The following comparison is conceptually helpful here. Imagine that a community decides to prohibit a previously unregulated activity, such as gambling on sporting events. Ideally, all citizens would follow the law and no one would gamble. Inevitably, some people believe they can gamble under the table, so they place bets with illegal bookies. If illegal gambling becomes too prevalent, the citizens will find ways to better enforce the anti-gambling law (perhaps through better enforcement or stronger deterrents). Once the citizens find a more effective method to weed out gambling, the amount of illegal gambling will drop. However, if after years with little gambling, the citizens might decide that they might not need to dedicate as much of their efforts to the anti-gambling cause. The society becomes a little lax at enforcement and lenient with punishments for violating the anti-gambling law. If a market still exists for sports gambling, the level of illegal activity

Changes in rates of preemptive initiation over time are measured by calculating moving averages of the data. Figure 1 displays the rate at which preemptive initiation has changed over time. The moving average represents the average percent of all militarized interstate disputes that were started by preemptive initiators. It was noted above that, as of 2001, preemptive initiators have started 29.5% of all disputes since 1945. The moving average represents what researchers would have found had they conducted the same type of analysis in previous years.

Overall, Figure 1 shows that the average rate of preemptive initiation stabilized around 1970 and has remained constant ever since. If a researcher had conducted this same study in any year after 1970, she would have reached the same conclusion reported in this Note: preemptive initiators start about one out of every three militarized disputes.

It seems that this 30% level has been implicitly accepted by states for over 30 years. If 30% were too high a level for the international system to tolerate, there would be evidence of downward trend in the average rate of preemptive initiation. Conversely, if more states believed they could get away with using preemptive force without suffering repercussions, there would have been a spike in the aggregate amount of preemptive force. The fact that the rate of preemptive force in the interstate system has neither risen nor declined for three decades indicates that some underlying consensus is embedded in the fabric of the international legal system.

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will rise again and the cycle will repeat itself. Over time, empirical patterns will show that the society has not reached a consensus on how to enforce its gambling laws. If the society eventually finds a consensus about how stringently to enforce the laws, the rate of violation will stabilize over time.

Figure 1 - Rate of preemptive initiation over time

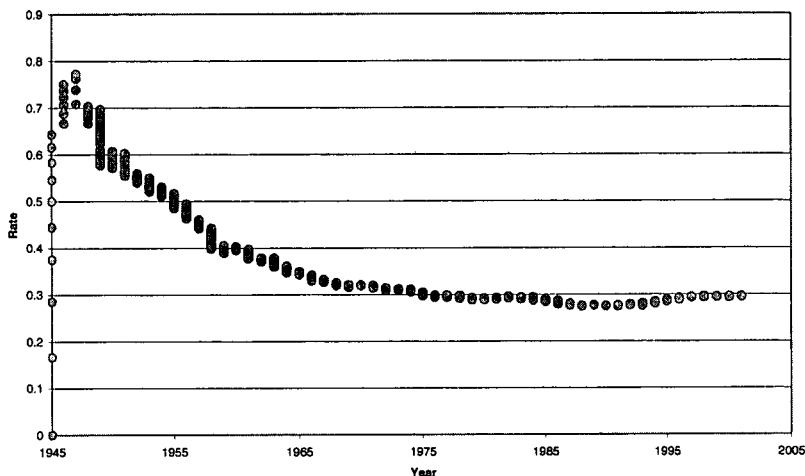
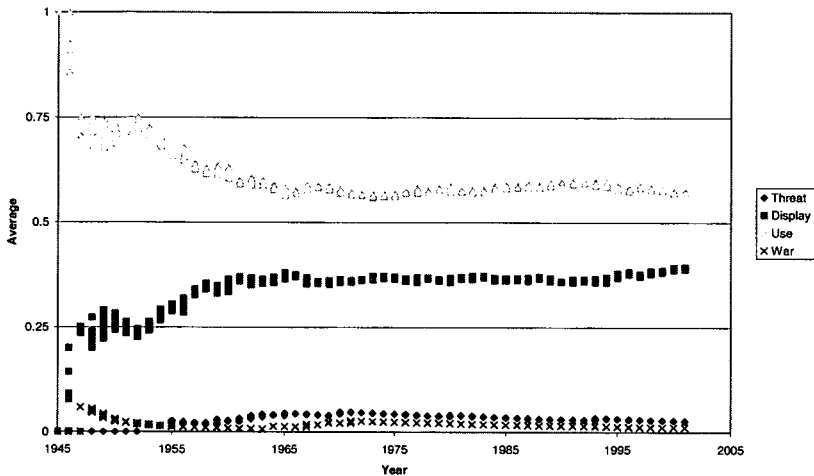


Figure 2 demonstrates that not only are states resorting to preemptive force at a steady rate, but they have also consistently employed the same type of force. In other words, the percentage of disputes that escalate to uses of force has neither increased nor decreased. Table 2 reported that disputes started by preemptive initiators are less likely to escalate than those started by aggressive initiators, although disputes started by preemptive initiators are still more likely to escalate than not. Figures 2 and 3 confirm that this is not merely a recent phenomenon. In fact, the rate at which preemptive initiators will use a certain method of force has provided predictable results since around 1960.



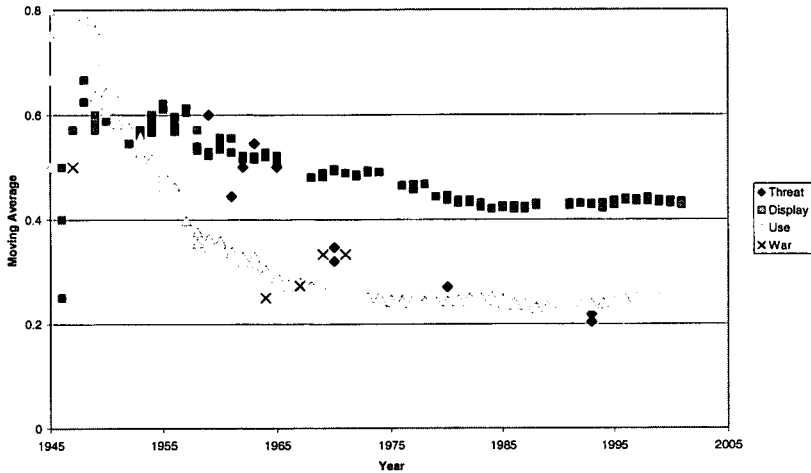
Figure 2 - Type of force employed by preemptive initiators over time



Uses of force by preemptive initiators indicate either unintended escalations/security spirals or surprise attacks. Figures 2 and 3 show that the frequency of uses of force by preemptive initiators is consistent over time, suggesting that either (1) the percentage of disputes started by preemptive initiators that escalate into uses of force has not fluctuated, or (2) there are fewer escalations, but more surprise attacks.

Of all uses of interstate force, preemptive initiators have been consistently responsible for the same proportion. If a researcher in 1975 had calculated the odds that an observed instance of force in the interstate system had been caused by a preemptive initiator, he would have returned the same results as today.

Figure 3 - Rates of preemptive initiation over time, by type of force



Across the board, empirical patterns of preemptive force in the U.N. era provide undeniably consistent evidence that customary law governs state behavior. The purpose of this Note is not to say what the laws are, nor is it to argue what the laws should be. Rather, the argument here is that there is compelling evidence that customary law *does* exist and that states *do* follow it. Just because Article 51 does not have binding authority and is open to varying interpretations does not mean that states operate in total anarchy and act without consequences. The consistency of state behavior over time, as demonstrated by the data, strongly suggests that states have implicitly agreed to be bound by a set of rules that diverge from the U.N. Charter. Customary law, not statutory language, governs preemptive force in the international legal system.

#### E. STRENGTH OF PREEMPTIVE INITIATORS

If an implicit set of legal norms, apart from the U.N. Charter, has governed state behavior during the U.N. era, they should apply universally to all states.<sup>154</sup> Powerful states should be held to the same standards as weak states and should not be

154. Restatement (Third) § 102, comment d (explaining that customary international law is unitary in the sense that its obligations bind all nations except those that “persistently object” during the development of the norm).

exempt from limitations on anticipatory self-defense. The quantitative data above reveals evidence that the overall amount of preemptive force in the interstate system has remained fairly constant during the U.N. era. This section looks at the relative strength of states that act preemptively compared to those that act aggressively.<sup>155</sup>

To compute the relevant data, the MID database must be merged with the National Materials Capabilities (NMC) database. NMC is widely used by researchers to measure the capabilities of a nation in a given year, regardless of whether that state is involved in a conflict.<sup>156</sup> Combining the two databases generates data on the capabilities of each combatant for a given militarized interstate dispute. In order to analyze the strength of initiators compared to their targets (and compared to other initiators), the initiator's capability for the year in which it instigated the dispute is measured as a percentage of the aggregate force of all combatants at the time of initiation. Thus, an initiator with a relative capability score of 0.5 is equally as strong as its target because it holds 50% of the force in the dyad. Likewise, an initiator with a relative capability score of 0.75 is three times as powerful as its target. Table 4 reports the results of the MID-NMC merger.

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155. Others have researched the linkage between capabilities and escalation, see Bruce Bueno de Mesquita, James D. Morrow, & Ethan R. Zorick, *Capabilities, Perception, and Escalation*, 91 AM. POL. SCI. REV. 15 (1997), but this author is unaware of any empirical studies that have accounted for initiator type.

156. NMC uses six indicators—military expenditure, military personnel, energy consumption, iron and steel production, urban population, and total population—as the basis for its Composite Indicator of National Capability (CINC) score, coded by year. J. David Singer, *Reconstructing the Correlates of War Dataset on Material Capabilities of States, 1816-1985*, 14 INT'L INTERACTIONS 115 (1987). NMC is available for online download at <http://cow2.la.psu.edu/COW2%20Data/Capabilities/nmc3-02.htm>.

<b>Table 4 - Relative capabilities of initiators, by initiator type and type of force</b>					
	<b>Aggressive Initiators</b>				
	<b>&lt;.25</b>	<b>.25-.5</b>	<b>.5-.75</b>	<b>&gt;.75</b>	<b>Total</b>
<b>Threat</b>	12	9	8	20	49
<b>Display</b>	38	41	57	104	240
<b>Use</b>	210	139	153	268	770
<b>War</b>	6	8	0	10	24
<b>Total</b>	266	197	218	402	1083
<b>% of total</b>	<b>24.56%</b>	<b>18.19%</b>	<b>20.13%</b>	<b>37.12%</b>	
	<b>Preemptive Initiators</b>				
	<b>&lt;.25</b>	<b>.25-.5</b>	<b>.5-.75</b>	<b>&gt;.75</b>	<b>Total</b>
<b>Threat</b>	4	2	1	5	12
<b>Display</b>	26	30	48	74	178
<b>Use</b>	77	45	50	87	259
<b>War</b>	2	0	1	2	5
<b>Total</b>	109	77	100	168	454
<b>% of total</b>	<b>24.01%</b>	<b>16.96%</b>	<b>22.03%</b>	<b>37.00%</b>	

Consider first the data on preemptive initiators only. Preemptive initiators tend to be stronger than their targets, but not by a significant amount. Preemptive initiators were weaker than their targets about 40% of the time and stronger than targets in roughly 60% of disputes. Preemptive initiators were very weak (at least three times weaker) compared to their targets 24% of the time. They were very strong (at least three times stronger) compared to their targets 37% of the time. The variance between capabilities of preemptive initiators is only slightly distinguishable.

Table 5 shows the percentage of force in each category used by preemptive initiators, broken down by capability levels. Notice that when preemptive initiators were very weak, disputes were more likely to escalate.<sup>157</sup> Even when the

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157. It makes sense that disputes started by very weak initiators are the most likely to escalate. If state A is over three times as strong as state B, state A will not be overly intimidated by state B's threats. State A believes, because of its

preemptive initiator was less than three times as weak, the dispute was still more likely to escalate than if the preemptive initiator was stronger than its target. If the preemptive initiator was stronger than the target, the dispute escalated roughly 50% of the time, no matter the size of the initiator's advantage in capabilities.<sup>158</sup>

<b>Table 5 - Percentage of force type by preemptive initiators, by relative capability</b>				
	<b>Preemptive Initiators</b>			
	<b>&lt;.25</b>	<b>.25-.5</b>	<b>.5-.75</b>	<b>&gt;.75</b>
Threat	3.67%	2.60%	1.00%	2.98%
Display	23.85%	38.96%	48.00%	44.05%
Use	70.64%	58.44%	50.00%	51.79%
War	1.83%	0.00%	1.00%	1.19%
<b>Total</b>	<b>100.00%</b>	<b>100.00%</b>	<b>100.00%</b>	<b>100.00%</b>

Now reconsider the data in Table 4 on preemptive initiators compared to aggressive initiators. The similarities between frequencies of initiation by capability level are remarkably similar. Grouped by relative capabilities, the percentage of states that initiates disputes is almost identical between preemptive and aggressive initiators. This suggests that a state's capability relative to its target does not predispose it to act preemptively rather than aggressively. Assuming that initiators have similar capabilities, a dispute is just as likely to escalate whether the initiator acts aggressively or preemptively. As a result, initiator strength is not as good of a predictor of dispute escalation as is initiator type.

Sections B and C showed, respectively, that: (1) rates of preemptive initiation appear steady over time; and (2) rates of

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capabilities advantage, that it can easily defeat state B on the battle field, so it does not hesitate to escalate the conflict. If the battle is not as quick and cheap as State A intends, then State A will have miscalculated on some level, but this is beside the point. What is important is that state A has less of an incentive to settle the dispute and give in to the demands of an inferior assailant.

158. This result also makes sense. If state A is stronger than state B, state B will not want to escalate a conflict when it is threatened by state A. State B believes that it will be defeated by state A in a military battle because state A has superior capabilities. Therefore, state B will prefer to settle the dispute without resorting to arms.

dispute escalation where the initiator was preemptive appear steady over time. Now, the data indicates that initiator strength has little predictive power. Combining these findings yields the conclusion that initiator strength is not a cause of the long-term stableness in rates of preemptive force. The fact that initiator strength has little effect on initiator behavior provides further evidence that legal norms, apart from Article 51, exist and apply equally to all states.

## V. CONCLUSIONS AND QUESTIONS FOR FURTHER RESEARCH

This Note presented three main quantitative findings. First, the rate of preemptive initiation in the interstate system has remained stable during the U.N. era. Second, the behavior of preemptive initiators when they do employ force has also been consistent. Third, the strength of preemptive initiators seems to only have a modest effect, if any, on their behavior. These main findings combine to provide strong evidence that customary law now significantly constrains and shapes the behavior of all states, regardless of their capabilities.

What do these findings mean for the study of preemptive initiation, strategic policies, and the future of international law in this area? If preemptive initiators are acting consistently over time, then more study of anticipatory self-defense is warranted. There are three priorities. First, scholars must learn to better identify preemptive initiation in case studies and develop coding rules so that it is easier to agree on the phenomena being observed. Over time, this will also help empirical legal studies to produce more fine-grained analyses of preemptive initiation. For example, the imminent threat and qualitative threat schools argue that the "armed attack" requirement of Article 51 must be expanded. The current data only sheds light on the type of action initiators took at the highest level of the dispute. Detailed data does not exist on the actions of revisionists who provoked initiators to attack preemptively. A fine-tuning of the data by historians and political scientists will allow researchers to study the motives of preemptive initiators, not just the consequences of their actions. This next step is crucial because it might shed light on the *opinio juris* component of customary law: whether preemptive initiators believed they were acting in compliance with international custom.

Second, scholars must figure out what it is about the U.N. era, apart from the U.N. Charter, that shapes the new legal regime and causes initiators to behave consistently. Answers may lie in increased balancing,<sup>159</sup> increased defense dominance,<sup>160</sup> presence of joiners,<sup>161</sup> variations in transparency,<sup>162</sup> and changes in the political and economic organizations of states.<sup>163</sup> Future research should expand upon the quantitative research here and test some of these propositions. In general, the legal community should focus more on empirical observations while political scientists should fine-tune the study of less tangible, non-material variables of dispute initiation such as willpower, strategy, and nationalism.

Third, scholars must carefully analyze the extent that misperception and miscalculation play in decisions for preemptive initiation.<sup>164</sup> If preemptive initiators are increasingly making bad assessments of their opponents'

159. See generally STEPHEN M. WALT, *THE ORIGINS OF ALLIANCES* (Robert J. Art & Robert Jervis eds., 1987) (describing the robustly balancing world of defensive realists).

160. *Id.*

161. Joiners are states that enter a dispute after the first day. Joiners may play a significant role in determining whether a state chooses to act preemptively, Scott Sigmund Gartner & Randolph M. Siverson, *War Expansion and War Outcome*, 40 J. CONFLICT RESOLUTION 4, 12 (1996), whether the conflict escalates (or de-escalates), Thomas J. Christensen & Jack Snyder, *Chain Gangs and Passed Bucks: Predicting Alliance Patterns in Multipolarity*, 44 INT'L ORG. 137, 166 (1990); Randolph M. Siverson & Joel King, *Attributes of National Alliance Membership and War Participation 1825-1965*, 24 AM. J. POL. SCI. 1, 2 (1980), and whether other allies will enter the conflict, Brett Ashley Leeds, *Do Alliances Deter Aggression? The Influence of Military Alliances on the Initiation of Militarized Interstate Disputes* 47 AM. J. POL. SCI. 427, 436 (2003).

162. See generally Alexandru Grigorescu, *International Organizations and Government Transparency: Linking the International and Domestic Realms*, 47 INT'L STUD. Q. 643 (2003).

163. See generally Robert O. Keohane, *International Institutions: Can Interdependence Work? in INTERNATIONAL POLITICS: ENDURING CONCEPTS AND CONTEMPORARY ISSUES* 119 (Robert J. Art & Robert Jervis, eds., 8th ed., 2007); ROBERT GILPIN, *GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER* (2001).

164. The scholarly literature on misperceptions and miscalculations as causes of conflict is enormous. The most widely cited works include: GEOFFREY BLAINIE, *THE CAUSES OF WAR* (1973); ROBERT JERVIS, *PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS* (1976); Robert Jervis, *War and Misperception*, 18 J. INTERDISC. HIST. 4 (1988); Robert Jervis, *Hypotheses on Misperception*, in *AMERICAN FOREIGN POLICY: THEORETICAL ESSAYS* (G. John Ikenberry, ed., 1989); Jack S. Levy, *Misperception and the Causes of War, Theoretical Linkages and Analytical Problems*, 36 WORLD POL. 1 (1983); STEPHEN VAN EVERA, *CAUSES OF WAR: POWER AND THE ROOTS OF CONFLICT* (1999).

intentions<sup>165</sup> and acting to preempt threats that are illusory, then any legal system that allows preemptive initiation needs serious reevaluation.

Concerns about misperception and miscalculation are especially important in a world increasingly troubled by terrorists, rogue states, and WMD. In many ways, a legal system that allows a certain amount of preemption also encourages a preemptive initiator to deploy WMD as the ultimate first-strike.<sup>166</sup> Conversely, a state will be more inclined to act preemptively if it suspects that its adversary possesses WMD.<sup>167</sup>

The customary law governing preemptive initiation appears predicated on the concept of deterrence. It seems that states may have agreed to allow a certain amount of preemptive force because it served as an effective deterrent to more dangerous threats and prevented the outbreak of military force in many circumstances. But, this worldview is inapplicable to terrorists and rogue states—those most likely to threaten international security in the modern world—because terrorists and rogue states are unlikely to be deterred.

Even if customary law governed state behavior in the post-Charter era, one main concern is that these rules were already made obsolete by the U.S. adoption of preemption as a legitimate strategy. Legal norms that would have prohibited certain instances of anticipatory self-defense in the past might be incapable of controlling the behavior in other parts of the world. By recharacterizing their intentions as preemptive, self-interested states like China, North Korea, Pakistan, or members of the Arab league might claim the legal entitlement to attack, respectively, Taiwan, South Korea, India, and Israel.<sup>168</sup> Even worse, these states might see an incentive to “preempt probable preempters,” causing the classical Prisoner’s Dilemma.<sup>169</sup>

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165. Dan Lindley & Ryan Schildkraut, *Is War Rational? The Extent of Miscalculation and Misperception as Causes of War* (forthcoming) available at <http://www.nd.edu/~dlindley/TWR/TWR%20Article.htm> (providing quantitative evidence that misperceptions and miscalculations increasingly cause wars).

166. See Schmitt, *supra* note 99, at 534; John Yoo, *International law and War in Iraq*, 97 AM. J. INT’L. L. 563, 575 (2003).

167. See Arend, *supra* note 63, at 743–44.

168. See Harold Hongju Koh, *Foreward: On American Exceptionalism*, 55 STAN. L. REV. 1479, 1516 (2003) (presenting examples of disputes ripe for exploitation through false claims of preemptive force as the legal justification for aggression).

169. See Glennon, *supra* note 99.



This Note cannot speak to individual cases such as North Korea-South Korea, and does not want to overstate the specific implications of its general findings. The most important policy implication is to make policy makers more aware that when it comes to using preemptive force, states appear to abide by customary law, not statutory law. For statutory law to be meaningful and effective, it should better reflect state behavior by codifying customary law. Through empirical analysis, the normative standards set by international law may become clearer and more helpful for states in ordering their relations, thus promoting greater stability for interstate relations. If at some point there is an effort to amend the U.N. Charter or to supplement the Charter with more detailed criteria for uses of force, a comprehensive understanding of state behavior among international lawyers will be essential.